No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1997

U S WEST, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

CONDITIONAL CROSS-PETITION OF U S WEST, INC. FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, requires incumbent local telephone companies to sell their retail services to competitors at wholesale rates, so that companies without any local network facilities can compete in the local telephone business by offering those services for resale. 47 U.S.C. § 251(c)(4). Incumbents must also make available pieces of their existing networks, known as "unbundled network elements," so that new entrants can fill in gaps in their networks. *Id.* § 251(c)(3). Congress established different pricing and substantive standards for these discrete entry methods.

The questions presented in this Conditional Cross-Petition —which is conditioned on a grant of Question Two in the petition of the Federal Communications Commission ("FCC")— are whether the FCC violated the statute's express distinction between resale and unbundled network elements by requiring incumbent telephone companies:

(1) to sell to competitors without any facilities of their own access to all the network elements associated with a particular retail service, not at the statute's discount rate for resale, but at the cost-based rate reserved for competitors with some of their own facilities who purchase access to individual network elements;

(2) to sell as unbundled network elements under section 251(c)(3) finished retail services such as caller ID and call forwarding, when the same services must be made available for resale under section 251(c)(4); and

(3) to sell network services and capabilities as unbundled network elements under section 251(c)(3), even though the equivalent services and capabilities are freely available from providers other than the incumbent telephone companies.

PARTIES TO THE PROCEEDING

The Cross-Petitioner is U S WEST, Inc. Respondents are the Federal Communications Commission and the United States of America.

The parties to the underlying proceedings are listed in the appendix to the petition for writ of certiorari in *AT&T Corp. et al. v. Iowa Utilities Board, et al.* No. 97-826, at 1a-4a, 73a-78a, 92a.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, U S WEST, Inc. advises the Court that it has no parent companies. Financial Security Holding, Ltd. is a non-wholly owned subsidiary of U S WEST, Inc.

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OPINIONS BELOW

The principal opinion of the Court of Appeals for the Eighth Circuit in *Iowa Utilities Board v. FCC* (Pet. App. 1a-67a),[1] as amended by the court's order on rehearing (Pet. App. 69a-72a), is reported at 120 F.3d 753. The Federal Communications Commission ("FCC") order reviewed by the Eighth Circuit — First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (excerpts of which are reproduced at Pet. App. 131a-337a) — is reported at 11 FCC Rcd 15499 (1996).

JURISDICTION

The judgment of the court of appeals in *Iowa Utilities Board* was entered on July 18, 1997. A subsequent order in that case, granting rehearing in part and denying rehearing in part, was issued on October 14, 1997. Pet. App. 69a-72a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, appear at Pet. App. 93a-130a.

STATEMENT OF THE CASE

In this Conditional Cross-Petition, Cross-Petitioner U S WEST, Inc. ("U S WEST") presents a third question in addition to the two presented in the Conditional Cross-Petition of Regional Bell Companies for a Writ of Certiorari filed on

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[1] All references to Pet. App. are to the Appendix filed by petitioner AT&T in No. 97-826.

December 24, 1997 ("RBOC Cross-Petition").[2/] As set forth in the RBOC Cross-Petition, Question Two in the FCC's petition[3/] artificially limits the issue presented to the Court by focusing solely on one aspect of the court of appeals' ruling concerning the scope of an incumbent telephone company's obligations to provide competitors with access to unbundled network elements; the FCC and its supporters ignore other aspects of the court's ruling that are integrally related to the issue they raise. RBOC Cross-Pet. at 3-4. Indeed, if the FCC were to prevail on its Question Two and incumbents were required to provide network elements in pre-assembled packages, then the question of what elements incumbents must provide would become even more critical. Accordingly, if the Court decides to review Question Two in the FCC's petition, then it should review the full issue actually implicated by the petitions and grant certiorari on the three questions presented here.

Cross-Petitioner U S WEST agrees with and adopts the Statement of the Case in the RBOC Cross-Petition, and supplements that statement only to state the case with respect to the third question raised by this Conditional Cross-Petition:

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 1996 ("1996 Act" or "Act"), opened local telephone markets by making available three potential paths of

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2/ Question Three in GTE's Conditional Cross-Petition for Writ of Certiorari filed on December 30, 1997 in *GTE Midwest, Inc. v. FCC* presents essentially the same question as Question Three in this Conditional Cross-Petition.

3/ Question Two of AT&T's petition and Question One of MCI's petition in 97-829 raise the same issue.

competitive entry—the construction of new networks, the use of unbundled elements from the incumbent's network, and resale. RBOC Cross-Pet. at 4-5. Congress established distinct substantive provisions, including different pricing regimes, for these distinct entry paths. While Congress recognized "it is unlikely that competitors will have a fully redundant network in place" when they first seek to enter the market, Congress intended to encourage "meaningful facilities-based competition" wherever feasible. S. Conf. Rep. 104-230, at 148 (1996); *see* H.R. Rep. No. 104-204, at 77 (1995). Accordingly, Congress deliberately struck a balance designed to give new entrants access to incumbents' networks and services where necessary to enable them to begin to compete, while preserving newcomers' incentives to build their own facilities.

One part of this balance involved specific limitations on the scope of an incumbents' unbundling obligations. In particular, Congress recognized that there was no need to require incumbent LECs to make the elements of their networks available on an unbundled basis unless failure to do so would adversely affect competition. Thus, Congress directed that, in determining what network elements should be made available on an unbundled basis, the FCC "shall consider, at a minimum," whether access to proprietary network elements is "necessary," and whether the failure to provide access to other network elements would "impair" the ability of the requesting carriers to provide service. 47 U.S.C. § 251(d)(2).

In implementing the Act, the FCC issued rules that destroyed the balance Congress had struck. The FCC rules do this by (1) permitting a competitor without any facilities of its own to bypass the resale provisions and instead buy an incumbent's entire network in the form of unbundled elements;

(2) allowing competitors to demand that incumbents furnish all of these elements on a combined, bundled basis; and (3) granting competitors the right to obtain "vertical services" (such as caller ID and call waiting) through either resale at wholesale rates or as network elements at cost-based rates. RBOC Cross-Pet. 8-9.

The FCC further gutted Congress's scheme by interpreting the statutory standards for mandatory unbundling in a way that renders them virtually meaningless. The FCC adopted rules that interpreted section 251(d)(2) to prohibit consideration of alternative sources outside the incumbent's network in determining whether access to a proprietary element is "necessary" or whether failure to provide other elements would "impair" the requesting carrier's ability to provide service. *See* GTE Cross-Pet. App. 1a-3a. In other words, under the rules adopted by the FCC, a competitor could demand that an incumbent unbundle an element of its network and offer it at cost even if an equivalent function, feature, or element was available from other sources. Thus, an incumbent can be required, after investing in developing a new service or feature, to turn that service or feature over to its competitors at forward-looking cost even if the competitors could obtain its equivalent elsewhere. The FCC recognized that its rules would impede technological innovation by incumbents, but determined that the competitive benefits of the rules would outweigh that effect.

On petitions for review of the FCC's Order, the Eighth Circuit vacated some of the FCC rules that undermine the statutory distinction between facilities-based competition and resale. RBOC Cross-Pet. at 9-12. But the court let stand the FCC rules allowing competitors with no facilities of their own

to purchase all the network elements needed to provide service and requiring incumbents to sell vertical services as network elements. The court also upheld the FCC's interpretation of the "impairment" and "necessary" standards under which no consideration was given to sources of network elements other than the incumbent. Pet. App. 47a-50a.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

Cross-petitioner U S WEST does not believe that the decision below is worthy of this Court's review and opposes the petitions for a writ of certiorari for the reasons given in the Opposition of the Regional Bell Companies to Petitions for a Writ of Certiorari (Dec. 18, 1997).

But if the Court decides to review the Eighth Circuit's application of *Chevron* to the FCC's rules on combinations of network elements—Question Two in the FCC's petition—it should consider the whole issue rather than an artificially truncated version. The Eighth Circuit's ruling that the Act requires competitors to combine network elements obtained from the incumbent was only one piece of that court's decisions regarding the scope of an incumbent's unbundling obligations. Accordingly, if the Court grants certiorari on the FCC's Question Two and reviews the lawfulness of FCC Rule 51.315(b), the Court should grant this conditional cross-petition as well to ensure that all the important aspects of the lower court's unbundling decision are properly before it.

Cross-Petitioner U S WEST adopts the RBOC Cross-Petition's statement of the reasons why the Court should, if it grants certiorari on the FCC's Question Two, also review the first two questions presented in this petition and the RBOC

Cross-Petition. U S WEST limits its discussion here to the reasons why the Court should in those circumstances also grant certiorari on the third question presented in this cross-petition.

If the Court Reviews the Scope of Incumbents' Unbundling Obligations, It Should Also Consider the Standards for Determining Which Network Elements Must Be Unbundled.

In section 251(d)(2) of the 1996 Act, Congress directed that the FCC "shall consider, at a minimum," certain standards in "determining what network elements should be made available" by incumbents to their competitors on an unbundled basis. Under that section, in determining whether proprietary elements should be unbundled, the FCC must consider whether access to those elements is "necessary," 47 U.S.C. § 251(d)(2)(A), and, as to all elements, the FCC must assess whether "failure to provide access . . . would impair the ability" of a requesting carrier to provide services, *id.* § 251(d)(2)(B).

The FCC fundamentally distorted these statutory commands. As the Eighth Circuit explained, the FCC determined that the "necessary" and "impairment" standards did "not require an evaluation whether a requesting carrier could obtain the desired elements from an alternative source," but rather required that the FCC consider solely the other elements that the new entrant would have at its disposal *from the incumbent LEC's own network*. Pet. App. 47a. In other words, the FCC refused to consider any available alternatives outside the incumbent LEC's network even if the newcomer could provide a service at an equivalent level of quality and cost by relying on those outside sources.

The Eighth Circuit upheld this interpretation on the theory that allowing the FCC to consider whether a network element could be obtained elsewhere could "eviscerate unbundled access" because "many network elements could theoretically be duplicated eventually." *Id.* at 48a. But the FCC did not simply refuse to consider "theoretical[]" alternatives outside of the incumbent's network that might be available "eventually." It refused to consider even actual elements outside the incumbent's network that were available to a new entrant immediately and that might be equivalent to the element available from the incumbent.

Such an approach defies the plain meaning of the Act. Access to a proprietary element from an incumbent simply cannot be "necessary," and failure to provide an element cannot "impair" a new entrant's ability to provide service, if an equivalent element is readily available from a source other than the incumbent. Congress told the FCC to consider the impairment and necessary standards in the Act because it concluded that there must be some justification for requiring the incumbent to unbundle any particular element. By mandating some evaluation of need—under the necessary and impairment standards—Congress expressed its preference that new entrants rely on non-incumbent facilities wherever possible, in order to promote facilities-based competition. After all, it is precisely where the new entrant can avail itself of facilities other than the incumbent's that the potential for true facilities-based competition is greatest. By refusing even to consider network elements available from sources other than the incumbent, the FCC thwarted Congress's clear intent.

Congress intended to apply strict standards to the unbundling of elements, particularly those of a proprietary

nature. It understood that no incumbent will invest in research and development if innovations must automatically be turned over to rivals. *See, e.g., Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480 (1974) (right of exclusivity provides "an incentive to inventors to risk the often enormous costs in terms of time, research, and development"). Congress intended that the Act spur innovation, not retard it. And, despite the Eighth Circuit's recitation of the Commission's unsupported assertion that the alleged procompetitive effects of unbundling "could" spur enough innovation to offset the reduced innovation caused by the FCC's interpretation of the necessary and impairment standards, Pet. App. 50a, the effect of the FCC's dilution of these standards obviously will be to reduce innovation in direct contravention of Congress's intent.

In sum, the rules that the Eighth Circuit preserved, just like the rules it struck down, "would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other." Pet. App. 71a. If the Court reviews one of these FCC rules, it should review and strike down all of them.

CONCLUSION

This conditional cross-petition should be granted if the Court grants review of Question Two in the FCC's petition.

Respectfully submitted,

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